

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 22, 2008

STATE OF TENNESSEE v. JENNIFER H. TROUT CHANDLER

Direct Appeal from the Circuit Court for Lawrence County
No. 25548 Robert L. Jones, Judge

No. M2007-01400-CCA-R3-CD - Filed October 2, 2009

Following a guilty plea on August 14, 2006, to two counts of theft over \$10,000, Defendant was sentenced to three years at 30 percent on each count, which were ordered to run concurrently on supervised probation. Defendant agreed to pay restitution in the amount of \$13,903.75 on count one and \$16,384.49 on count two. Defendant was also permitted to transfer her probation to Kentucky as a condition of the plea agreement. A probation violation warrant was issued on January 10, 2007, alleging that Defendant had violated the terms of her probation by failing to pay restitution and court costs. The trial court revoked Defendant's probation on May 18, 2007, and ordered her to serve the remainder of her sentence incarcerated. On appeal, Defendant argues that the trial court erred in revoking her probation. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., J.J., joined.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the appellant, Jennifer H. Trout Chandler.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Michel Bottoms, District Attorney General; and Christi Thompson, Assistant District Attorney General, for the Appellee, the State of Tennessee.

OPINION

I. Background

Dwight Davis of the Board of Probation and Parole testified for the State. Mr. Davis testified that Defendant was convicted of two counts of Class C felony theft and received an effective three-year sentence. She was placed on probation on August 14, 2006, and then transferred to Kentucky in November of 2006. Defendant agreed to pay restitution in the amount of \$13,903.75

on count one and \$16,384.49 on count two. As a special condition of her probation transfer to Kentucky, Defendant agreed to pay \$881.12 per month in restitution. Mr. Davis testified that he wrote the address of the clerk's office on the agreement that was signed by Defendant. He said that Defendant at first indicated that she could pay the restitution off in six months with proceeds from the sale of her mother's house. Defendant was also employed at a doctor's office at the time she was placed on probation. However, Defendant's husband later called and said that Defendant had lost her job.

Mr. Davis testified that when Defendant's Kentucky probation officer asked him to check on how much restitution Defendant had paid, it was discovered that she had not paid anything. Mr. Davis then signed a probation violation warrant on January 25, 2007. He said that as of May 18, 2007, Defendant had not paid any restitution, and she had not talked to him about why she had not made any of the agreed upon payments.

Defendant testified that at the time of the plea, her mother was in the process of selling her house and planned to give her some of the proceeds to pay the restitution. However, Defendant said that her mother was unable to sell the house or obtain a home equity line of credit. Defendant testified that at the time of her guilty plea, she was working full-time making fourteen dollars per hour. She was later cut back to part time due to time she had missed. Defendant testified that she was eventually fired in October of 2006 for missing too much work when her husband was hospitalized. She did not do back to work until February of 2007. Defendant testified that she was working for a dentist earning thirteen dollars per hour, but she was fired after her arrest on the probation violation warrant. She told the court that at no time was she able to make the monthly restitution payment of \$881.12. Defendant testified that she had recently been hired for a full-time position in the billing office with Patient First Physician's Group. She said that if she was able to continue with that employment, she would be able to pay \$300.00 per month toward her restitution. She explained that her household consisted of her, her husband, who is disabled, and her daughter. Her son and two stepsons are at the residence half of the time. Defendant also testified that her mother's house was still on the market. At the revocation hearing, Defendant offered to pay \$300.00 toward restitution. She also told the court that she had paid her supervision fee of \$25.00 per month to her Kentucky Probation Officer.

Kenneth Terry, Defendant's husband, testified that he worked with Defendant's mother and a loan officer at Well's Fargo Financial in order to obtain a loan, but the loan fell through due to a lack of income. He said that at the time Defendant was placed on probation, he was working for Pitney Bowes earning sixteen dollars and eighty cents per hour. However, he is now on long-term disability and receives \$197.00 every two weeks. Mr. Terry testified that his mother-in-law's house had been taken off the market and that she was still "talking to somebody about some private deals."

The trial court determined that based on all the evidence presented at the hearing, Defendant violated the terms of her probation. As a result, the trial court revoked her probation and ordered her to serve the balance of her sentence incarcerated.

II. Analysis

A trial court may revoke a sentence of probation upon a finding by a preponderance of the evidence that the defendant has violated the conditions of his release. T.C.A. 40-35-311(e) (2006); Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). A revocation will be upheld absent a showing that the trial court abused its discretion. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). In order to establish that the trial court has abused its discretion, the defendant must show that there is no substantial evidence to support the determination that he violated his probation. Id. (citing State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief will be granted only when “the trial court’s logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved.” State v. Shaffer, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999)). Upon finding a violation, the trial court may “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered.” T.C.A. 40-35-311(e). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension.” Id. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. See State v. Duke, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

Before a trial court may revoke a defendant’s probation for failure to make restitution, the court must determine the underlying reasons why the defendant did not pay. State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986) (citing Bearden v. Georgia, 461 U.S. 660, 668 (1983)). In Dye, the Tennessee Supreme Court held that a trial court must make specific findings when revoking a defendant’s probation due to failure to pay restitution as a condition of probation. Id. If the trial court finds that the “defendant has[s] neglected or willfully refused to pay,” including making bona fide efforts to obtain the means to pay restitution, then probation may be revoked. Id. at 41 (citing Bearden, 461 U.S. at 674). However, if the defendant does not have the ability to make restitution payments and makes no effort to obtain the means to pay, the trial court must find that “alternatives to imprisonment were inadequate to meet the State’s interests in punishing the offender.” Id. If these findings are not made by the trial court, the defendant must be allowed to remain on probation. Id. at 41.

Having considered Defendant’s arguments, we are unpersuaded that the trial court abused its discretion. The trial court essentially found that Defendant neglected or willfully refused to pay her restitution. The court noted at the hearing on Defendant’s Rule 35 motion, in which she asked the court to reconsider its revocation of her probation, that “[s]he was not revoked because she failed to pay every monthly installment in the exact amount Mr. Davis suggested. She was revoked because she had not paid a penny, and had not communicated with anyone in Tennessee about her difficulties in paying, or sought any relief.” The court further found that Defendant “just ignored the orders of the Court and the requirements of probation . . .”

The court's findings are amply supported by the record. Defendant pleaded guilty to two counts of theft over \$10,000 and was ordered to pay \$13,903.75 in restitution on count one and \$16,384.49 on count two. She then signed an agreement to make monthly payments of \$881.12. At the time she was placed on probation, Defendant had a good earning capacity and was employed full-time at a doctor's office. She planned to pay restitution within six months from the proceeds of the sale of her mother's house, and she was placed on a payment schedule until that happened. After the house did not sell, and Defendant eventually lost her job for missing too much work, Defendant never communicated with her probation officer. She also did not pay anything toward restitution after she found another job. Further, as pointed out by the State, Defendant was able to retain an attorney after being arrested on her probation violation warrant. The trial court then set a lower bond and continued the case after Defendant agreed to have restitution paid by May 18, 2007. Defendant again failed to pay restitution claiming that financing on a loan fell through. The trial court was well within its authority to determine that Defendant violated her probation and to order her to serve the remainder of her sentence incarcerated. Accordingly, Defendant is not entitled to relief.

Defendant also argues that the trial court erred by failing to address her ability to pay restitution at the time of the plea agreement. However, this issue is beyond the scope of this appeal.

Rule 3 (b) of the Tennessee Rules of Appellate Procedure, which governs appeals of right by defendants in criminal cases, provides:

In criminal actions an appeal of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(I) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as a right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

While Rule 3(b) allows Defendant to appeal the trial court's order revoking her probation, she cannot now collaterally attack the order to pay restitution that was part of her plea agreement. In any event, as previously stated, Defendant was gainfully employed at the time of the guilty plea. She was employed full-time at a doctor's office earning fourteen dollars per hour. She told the court that she could pay restitution within six months from the proceeds of the sale of her mother's house, and she was placed on an agreed upon payment schedule until that happened. After the house did not sell, and Defendant's mother was unable to obtain a home equity loan, Defendant failed to petition the trial court to adjust or waive payment or performance. A defendant, at any time, may

petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof. See Tenn. Code Ann. § 40-35-304(f).

Defendant also argues that the trial court erred in revoking her probation because the plea agreements did not specify the payment arrangements. According to T.C.A. § 40-35-304(g)(1), if there is no sentencing hearing or presentence report because a defendant's sentence is agreed upon and the payment of restitution is a part of the sentence, the plea agreement should include the amount of restitution and time of payment and may permit payment or performance in installments. Defendant's plea agreement in this case met those requirements. It included the amount of restitution on each count and stated that Defendant had three years on probation to pay the amount. The trial court then permitted Defendant to make payments as set forth in an agreement signed by Defendant at the time of her guilty pleas. We conclude that the plea agreement in this case was sufficient to meet the requirements of T.C.A. § 40-35-304(g)(1).

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE